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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SAN DIEGO SUNBELT, INC.,

Plaintiff and Appellant,

v.

DALE DYRSSEN,

Defendant and Respondent.

D053139

(Super. Ct. No. GIC876106)

APPEAL from a judgment of the Superior Court of San Diego County, Judith F. Hayes, Judge. Affirmed.

I

INTRODUCTION

Plaintiff San Diego Sunbelt, Inc. (Sunbelt) appeals from a judgment of the trial court in favor of defendant Dale Dyrssen. Sunbelt contracted with Byron Wright, the owner of Coyote Rentals & Sales (Coyote), an equipment rental company, to be the exclusive listing agent for the sale of Coyote. Sometime after the exclusive listing period

had expired, Dyrssen and his business partner, John Campbell, agreed to purchase Coyote from Wright. Sunbelt sued Wright, Coyote and Dyrssen for breach of contract.

Sunbelt's claim against Dyrssen was based on a confidentiality agreement Dyrssen signed during the listing period (Confidentiality Agreement). Dyrssen had inquired of Sunbelt about an anonymous sales listing for an equipment rental business. Because Dyrssen had already been introduced to Wright and Coyote by another source, he told Sunbelt that he did not need the information if the listing was for Coyote. Sunbelt nevertheless required Dyrssen to sign a document that stated that he acknowledged being first introduced to the business—which was identified only by a listing number and not by name—by Sunbelt.

After a bench trial, the court found Wright liable to Sunbelt for a broker's commission of \$140,000, but determined that Dyrssen was not liable to Sunbelt under either the Listing Agreement between Wright and Sunbelt, or the Confidentiality Agreement. The court found that Dyrssen was not a party to the Listing Agreement, and also found that there was a failure in consideration to support the Confidentiality Agreement Dyrssen signed because Sunbelt did not, in fact, introduce Dyrssen to Coyote.

On appeal, Sunbelt challenges the trial court's ruling that the Confidentiality Agreement could not be enforced to require Dyrssen to pay a commission to Sunbelt. Sunbelt argues that the trial court was confused and failed to consider Dyrssen's liability under the Confidentiality Agreement, and that the court was further mistaken in finding that Sunbelt did not introduce Dyrssen to Coyote. Sunbelt also argues that the court erred in finding a lack of consideration because "consideration is stated in the Agreement, i.e.,

release of confidential information to allow the [prospective] buyer to enter into discussions with the seller." We conclude that the trial court clearly considered whether Dyrssen was liable under the Confidentiality Agreement, and further conclude that there is substantial evidence to support the trial court's findings with regard to Dyrssen's lack of liability pursuant to that agreement. We therefore affirm the judgment of the trial court.

II

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*

Sunbelt and Wright entered into the Listing Agreement in September 2004. The Listing Agreement provided that Wright, the seller, would pay a broker's fee to Sunbelt "upon any [d]isposition of the Business whether made by Broker, Seller, or anyone else during the term of this Agreement and any extension." The Listing Agreement also stated that Wright agreed "to immediately pay the [broker's fee] to the Broker if the Business is disposed of within twenty[-]four months from the Termination Date of this Agreement to any person or entity referred to the Business by the Broker, or to whom Broker o[r] Seller furnished information regarding the Business during the exclusive period."

The Listing Agreement was set to expire on March 8, 2005. According to Wright, on March 9, 2005, he and a Sunbelt broker agreed to extend the Listing Agreement for an additional month because the broker told Wright that he had a potential purchaser. That potential purchaser signed a letter of intent but ultimately did not agree to purchase Coyote.

In March 2005, Dyrssen and Campbell learned through Campbell's son-in-law, who had learned the information from a Coyote employee, that Wright wanted to sell Coyote, which was located close to Campbell's home. Campbell spoke with Wright in person at Coyote for the first time in mid-March. Campbell and Dyrssen stopped by the business a few times, and Dyrssen met with Wright "some time at the end of March."

Wright told Campbell that he had a serious offer he was already considering. Campbell then made what he referred to as a "backup offer." Wright was not interested in Campbell's offer because he did not think that Campbell and Dyrssen had sufficient resources to purchase the business. Wright did not tell Sunbelt about his contacts with Campbell and Dyrssen.

In the meantime, Dyrssen had been researching the equipment rental market and trying to find out whether Coyote had any potential competitors, or what Dyrssen termed as doing his "due diligence" with regard to Coyote. During the course of this research, Dyrssen came across a Sunbelt listing for the sale of an equipment rental business. The listing was a "blind" listing, in that it identified the business only by a listing number.¹ Dyrssen wondered if the listing was for Coyote or for a competitor of Coyote's. He inquired with Sunbelt about the business referred to in the blind listing, but informed Sunbelt that he did not need the information if the listing was for Coyote, because he already had that information.

¹ According to testimony at trial, a blind listing is one for which "the name of the business is not disclosed."

Sunbelt refused to tell Dyrssen whether the listed business was Coyote unless Dyrssen agreed to sign a document acknowledging "being first introduced" to the anonymous business by Sunbelt.² The document also provided that Dyrssen agreed to a number of other terms, including a promise not to disclose confidential information about the business to others or to buy the business without Sunbelt's participation. The penultimate paragraph in the document provided, "Should Buyer purchase all or part of the stock or assets of Business, acquire any interest in, or become affiliated in any capacity with Business without Broker's participation or in any way interfere with Broker's right to a fee, Buyer shall be liable to listing broker or cooperating broker for such a fee and any other damages including reasonable attorney's fees and costs."

Not knowing the identity of the business, which was identified only as "Listing #207 Equipment Rental" in the document, Dyrssen signed the Confidentiality Agreement on March 30, 2005. The listing broker for Coyote, Bruce Keller, admitted at trial that Dyrssen "wouldn't have known the name of the company when he asked for the information" from Sunbelt.

The business associated with the blind listing turned out to be Coyote, although Dyrssen did not learn the identity of the business until approximately April 5, 2005. It

² The document, entitled "BUYER'S ACKNOWLEDGEMENT OF INTRODUCTION AND CONFIDENTIALITY AGREEMENT," began with the following statement: "The undersigned, individually and on behalf of any affiliated prospective buyer, acknowledges being first introduced to the business identified herein by SAN DIEGO SUNBELT ([']Broker'). The undersigned requests information relating to the following business: Listing #207 Equipment Rental ('Business')."

appears that Dyrssen did not speak with Keller after learning that "Listing #207 Equipment Rental" was Coyote, and the two never met.³ Sunbelt never qualified Dyrssen to purchase the business, and it never informed Wright during the listing period that Dyrssen was a potential buyer.

Wright, who had been unhappy with Sunbelt's service, did not renew the Listing Agreement after the 30-day extension expired on April 8, 2005.

The deal that Wright had been pursuing with another buyer fell through. In July 2005, months after the Listing Agreement had expired, Wright contacted Dyrssen and Campbell to inquire as to whether they might still be interested in purchasing Coyote. They were. In late July 2005, an individual who assists Campbell and Dyrssen with their taxes helped Wright incorporate Coyote in preparation for the sale of the business to Campbell and Dyrssen.

³ Sunbelt takes great liberty in providing the factual background of this case, and in some instances, misrepresents the record. For example, Sunbelt asserts, "In March 2005, SUNBELT sales agent Bruce Kelly, discussed the sale of COYOTE with a prospective buyer, to wit: Dale DYRSSEN, and on March 30, 2005, Dyrssen signed [the Confidentiality Agreement] regarding Listing #207 Equipment Rental (COYOTE)." However, at the time Dyrssen spoke with Keller, which was prior to March 30, Dyrssen was not aware that the listing about which he was inquiring was for Coyote. Sunbelt's suggestion that Keller "discussed the sale of COYOTE" with Dyrssen before Dyrssen signed the Confidentiality Agreement is therefore misleading. Further, by Keller's own admission, Dyrssen dealt mainly with the office manager, Katie Collins, not Keller, and Collins required Dyrssen to sign the Confidentiality Agreement before she would identify the listed business.

Dyrssen and Campbell signed an offer to purchase all of Wright's stock in Coyote on August 8, 2005.⁴ On August 13, Wright transferred his stock to Dyrssen and Campbell. At some point during the summer of 2005, Keller became aware that Wright had sold Coyote to Dyrssen and Campbell. Exactly how and when Keller obtained this information is unclear from the testimony at trial.

During the first week of August 2005, Wright received a letter from Sunbelt in which Sunbelt listed individuals who Sunbelt claimed to have introduced to Coyote during the listing period.⁵ Dyrssen's name was on that list. By this time, the sale of Coyote to Dyrssen was already in process. Wright did not know that Dyrssen had made

⁴ Sunbelt states that "DYRSSEN and his partner, John Campbell (CAMPBELL), visited the subject property and subsequently on June 8, 2005, made an offer to purchase." In an apparent effort to suggest that Dyrssen and Campbell learned about Coyote from Sunbelt, Sunbelt places this "fact" *after* its description of Dyrssen's inquiry about Listing #207, despite the fact that uncontradicted testimony—which the court must have believed, given its findings of fact—established that Dyrssen and Campbell "visited the subject property" prior to Dyrssen's inquiry of Sunbelt about Listing #207. In addition, Dyrssen and Campbell's formal offer to purchase Coyote occurred on August 8, 2005—after Wright had contacted them to see if they were still interested in purchasing the business.

⁵ In another example of Sunbelt's mischaracterization of the record, Sunbelt writes, "On July 21, 2005, SUNBELT notified WRIGHT of its list of potential buyers which SUNBELT introduced to the property which included DYRSSEN." However, the page in the reporter's transcript that Sunbelt cites to support this statement actually demonstrates that a letter that included a list of potential buyers that Sunbelt referred to Wright did not reach Wright until the "first week of August," despite the fact that it was dated July 21, 2005. Keller, who signed the letter, testified that he had no idea when the letter was sent or why it was sent so many months after the Listing Agreement had expired. The timing of the letter seems to coincide with Keller's becoming aware of the sale of Coyote, despite the fact that normally, "*within a few days after the termination of a listing*, [Keller] would have talked with [Katie] and said we need to put together a list and send it out." (Italics added.)

an inquiry of Sunbelt, and believed that Sunbelt had not, in fact, introduced Dyrssen to Coyote.

B. *Procedural background*

After learning of the sale of Coyote to Dyrssen and Campbell, Sunbelt initiated this action against Wright, Coyote, and Dyrssen, seeking the unpaid broker's commission. In Sunbelt's third amended complaint, it alleges two causes of action for breach of contract relating to the sale of Coyote—one against Wright and the other against Dyrssen.⁶ Dyrssen and Coyote apparently filed a cross-complaint against Sunbelt and Wright.⁷

The court conducted a bench trial on March 17, 2008. Sunbelt was represented by counsel, and Wright and Dyrssen each appeared without counsel.

After trial, the court found that Wright had breached the Listing Agreement and that he owed Sunbelt a real estate broker's commission in the amount of \$140,000. The court found that Dyrssen was not a party to the Listing Agreement, and that he was not obligated to pay a commission pursuant to the Listing Agreement. The court further found that Sunbelt had not introduced Dyrssen to Coyote, and that "there was a failure of consideration regarding the Agreement signed by Dyrssen and Plaintiff."

⁶ Sunbelt named Coyote as a defendant, but by the third amended complaint, it no longer specifically alleged a cause of action against Coyote or requested relief from Coyote. Sunbelt apparently dismissed its claims against Coyote prior to filing the third amended complaint.

⁷ Although the cross-complaint is not in the record on appeal, the trial court refers in the judgment to a cross-complaint.

The court entered judgment on May 15, 2008. The judgment provides as follows:

"1. That plaintiff SAN DIEGO SUNBELT, INC. recover judgment against defendant BYRON WRIGHT in the amount of \$140,000 plus costs.

"2. That plaintiff SAN DIEGO SUNBELT, INC. take nothing by way of its complaint against defendant DALE DYRSSEN."^{8]}

"3. That cross-complainants DALE DYRSSEN and COYOTE RENTAL & SALES, INC., recover nothing by way of their cross-complaint against cross-defendants SAN DIEGO SUNBELT, INC., and BYRON WRIGHT."^{9]}

Sunbelt filed a timely notice of appeal on May 28, 2008, and filed an opening brief with this court. Dyrssen has not responded, either by way of motion or by filing a respondent's brief.

III

DISCUSSION

Sunbelt argues that there is uncontradicted evidence that Dyrssen was a party to the Confidentiality Agreement, that Sunbelt introduced Dyrssen to Coyote during the listing period, and that there was consideration between the parties. In essence, Sunbelt is arguing that there is insufficient evidence to support the trial court's findings. We disagree.

⁸ Although the court's order states that it "finds Judgment in favor of Defendant Coyote Rentals and Sales, Inc. and Defendant Dale [Dyrssen]," the judgment the court signed, which was prepared by Sunbelt's counsel, does not state that Sunbelt is to take nothing from Coyote on its complaint. The court's order makes it clear that Sunbelt did not prevail against Coyote. The omission in the judgment appears to be a clerical error.

⁹ The court's judgment on the cross-complaint is not at issue in this appeal.

First, we reject Sunbelt's contention that the trial court did not in fact find that Dyrssen was a party to the Confidentiality Agreement. Sunbelt argues, "The court's order stated that defendant DYRSSEN was not a party to the 'agreement' and therefore [was] not obligated to pay a commission pursuant to it. It is believed that the trial judg[e] was confused and based its decision on the Exclusive Listing Agreement and failed to consider Dyrssen's breach of the Confidentiality Agreement."

Sunbelt's interpretation of the court's order is unreasonable. The court referred to two different "agreements" in its ruling as to Dyrssen, indicating that the court considered Dyrssen's potential liability under both the Listing Agreement *and* the Confidentiality Agreement. Although the trial court did not separately identify the Confidentiality Agreement by using a term other than the word "Agreement," which the court had previously defined as referring to the "Brokerage Agreement" (i.e., the Listing Agreement),¹⁰ the court's repeated use of the word "Agreement" in this context appears to be a mere oversight, since the context clearly demonstrates that the court intended to refer to the Confidentiality Agreement when it referred to a second "Agreement."

The court stated:

"The Court finds Defendant Coyote Rentals and Sales, Inc. and Defendant Dale [Dyrssen] were not parties to the Agreement and are not obligated to pay any commission pursuant to that Agreement. Further, [Dyrssen] was not introduced to the business by the Plaintiff

¹⁰ In the first paragraph of the order, the court stated, "[T]he Court hereby finds Defendant Wright 'disposed of' the subject business within the period of the Brokerage Agreement (hereafter the Agreement) that he entered into with Plaintiff San Diego Sunbelt, Inc."

and there was a failure of consideration regarding the Agreement signed by [Dyrssen] and Plaintiff."

The court's first and second references to the "Agreement" in this paragraph clearly refer to the Listing Agreement; no one maintains that Dyrssen was a party to the Listing Agreement. The term "Agreement" in the second sentence, however, is modified by the phrase "signed by [Dyrssen] and Plaintiff." The only agreement that Dyrssen purportedly had with Sunbelt is the Confidentiality Agreement. The court was thus clearly referring to the Confidentiality Agreement in the second sentence. Although it would have been clearer if the court had identified the Confidentiality Agreement by name, the most reasonable reading of the trial court's order is that the court found Dyrssen not liable after considering both the Confidentiality Agreement and the Listing Agreement.

We reject Sunbelt's challenge to the sufficiency of the evidence concerning when and how Dyrssen was introduced to Coyote. There is substantial evidence in the record to support the court's finding that Sunbelt did not introduce Dyrssen to Coyote. Specifically, Dyrssen testified unequivocally that he was aware that Coyote was for sale and that he had been pursuing the possibility of purchasing Coyote before he saw Sunbelt's blind listing for an equipment rental business. Dyrssen testified that he first heard of Coyote, and that it was for sale, from Campbell, in late March 2005. According to both Campbell and Dyrssen, they had been considering purchasing a business together. Campbell heard through an employee at Coyote, who shared this information with Campbell's son-in-law, that Coyote was for sale. Campbell spoke with Wright directly

on a number of occasions through March 2005. Dyrssen also met with Wright sometime near the end of that month.

By late March 2005, Dyrssen was researching the equipment rental market, trying to find Coyote's competitors, when he encountered Sunbelt's blind listing on the Internet. When Dyrssen noticed the blind listing for an equipment rental company, he "started to wonder is this Coyote, or is this a potential competitor that I need to worry about" Dyrssen testified that he first made contact with Sunbelt by calling them: "First a phone call, asking if this was Coyote; and Katie Collins said that she could not answer that information until I filled out the proper forms." Dyrssen said that he completed a "Buyer Profile" form and the Confidentiality Agreement on March 30, 2005, because he was curious "[t]o see if there was another rental equipment company that would be a competitor to Coyote Rentals." Dyrssen had already met Wright by the time he signed these papers. Dyrssen subsequently learned, on or around April 5, 2005, that the blind listing he had inquired about was in fact Coyote.

Campbell and Wright testified similarly as to the timeline of these events. Both testified that Sunbelt had not introduced Dyrssen to Coyote. There is clearly substantial evidence to support the trial court's factual determination that Sunbelt did not introduce Dyrssen to Coyote.

Sunbelt nevertheless suggests that the trial court could have found Wright, the Seller, liable to Sunbelt under the Listing Agreement only if the court determined that Dyrssen had been introduced to the business by Sunbelt, and since the court did find Wright liable, the court must have found that Sunbelt made the introduction to Dyrssen.

However, a review of the Listing Agreement demonstrates that Wright agreed to pay a broker's commission to Sunbelt even if Wright sold Coyote to someone Sunbelt had not introduced to the business. Specifically, the Listing Agreement provided that Wright agreed to pay Sunbelt a broker's fee "if the Business is disposed of within twenty four months from the Termination Date of this Agreement to any person or entity referred to the Business by the Broker, or to whom Broker *o[r] Seller* furnished information regarding the Business during the exclusive period." (Italics added.) Here, there was evidence that, at a minimum, Wright furnished information about Coyote to Campbell and Dyrssen during the listing period. Thus, the trial court's finding that Wright owed Sunbelt a broker's fee under the Listing Agreement does not mean that the trial court implicitly determined that Sunbelt introduced Coyote to Dyrssen, or that the court erred in specifically finding that Sunbelt did not introduce Coyote to Dyrssen.

The trial court's factual finding that Sunbelt did not introduce Dyrssen to Coyote supports the court's determination that the Confidentiality Agreement that Dyrssen signed was unenforceable for lack of consideration. The Confidentiality Agreement is premised on the idea that Sunbelt would introduce a potential buyer to a business that is for sale, and that this introduction is of value to the potential buyer because the potential buyer would not otherwise have access to information about that business opportunity. That is not what occurred here. The trial court specifically found that Sunbelt did not provide Dyrssen with the service that the Confidentiality Agreement contemplated it would provide—that is, Sunbelt did not introduce Coyote to Dyrssen. Rather, Sunbelt provided Dyrssen with information that he already possessed. In fact, as Sunbelt's owner indicated

at trial, an individual who has already had contact with the seller through another source is in a different position from that of a person who is first introduced to the seller by

Sunbelt:

"Again, in a situation where somebody looks [at] a business that they are familiar with, then they can tell us ahead of time; and if it's that, don't provide it, tell that to the broker or you don't sign it. You talk to the broker, that type of thing. [¶] You can send – like you [Dyrssen] said that you did, send an e-mail or fax concurrently with doing this or signing an NDA or confidentiality agreement, noncircumvention, notifying us of that."

The evidence demonstrated that Dyrssen informed Sunbelt that he was already familiar with Coyote before he signed the Confidentiality Agreement, and that he also told Sunbelt that he did not want the information about the blind listing if the listing was for Coyote. The record thus supports the trial court's findings in this regard.

IV

DISPOSITION

The judgment of the trial court is affirmed.

AARON, J.

WE CONCUR:

NARES, Acting P. J.

HALLER, J.